

Malayan Banking Bhd v Noor Aziah bt Ab Hana

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COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NO D-02-1614
OF 2011
CLEMENT SKINNER, DAVID WONG AND ROHANA YUSUF JJCA
12 MAY 2014

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Hire Purchase — Hire purchase agreement — Allegation that agreement was void — Hirer alleged chassis number of car subject to hire purchase agreement ('HPA') tampered with disabling financier from transferring ownership to her — Hirer obtained declaration HPA void for failure of consideration — Whether High Court wrong to have granted declaration as hirer failed to prove allegation of tampering or that financier was guilty of it — Whether financier had no duty to verify authenticity of vehicle's chassis number before entering into HPA — Whether hirer sourced for car herself and financier relied upon hirer's representation that ownership of vehicle had no defect — Whether no cause for financier to suspect tampering as it acquired ownership of vehicle from original owner without incident

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The respondent approached the appellant to finance her purchase of a second-hand car and the parties entered into a hire purchase agreement ('HPA'). Sometime later, the respondent was informed by PUSPAKOM, when she sent the car there for inspection with the intention of transferring ownership of the vehicle, that the chassis number of the car had been tampered with. She was also informed by the Road Transport Department and PUSPAKOM that the car was not road worthy and should not be driven on the road. The respondent informed the appellant about the same and wanted the appellant to take back the car and refund all payments she had made. The appellant refused to do so and requested the respondent to complete her obligations under the HPA. After fully settling all payments due from her under the HPA, the respondent sought a declaration from the High Court that the HPA was invalid and void on the ground there had been a total failure of consideration as she was unable to have the car transferred to her on account of the alleged tampering of the chassis number. The High Court held the HPA was void ab initio and ruled that the appellant, as owner of the car, was duty-bound to have ensured the vehicle's chassis number had not been tampered with and it should have sent the car to PUSPAKOM for that purpose before entering into the HPA. The appellant appealed against the decision to the Court of Appeal. The respondent filed a cross-appeal in respect of the quantum awarded to her by the High Court.

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Held:

- A (1) The respondent failed to prove that the chassis number of the vehicle had been tampered with or that the appellant was responsible for the tampering. Hence, the appellant could not be held liable for any loss the respondent had suffered. There was merit in the appellant's contention that the respondent should have tendered a chemist's report to prove the
- B allegation of tampering but no such report was tendered. Accordingly, there was no legal basis for the High Court to have sustained the respondent's claim (see paras 22 & 24).
- C (2) There was no duty on the appellant to have verified the chassis number of the vehicle before the hiring. In a hire purchase agreement scenario, the respondent was the one who purchased the car directly from the original owner and a financier like the appellant came into the picture when there was a request for finance. In granting financial help, the appellant relied on the respondent's representation that there was no defect in respect of
- D the ownership of the vehicle. To expect the appellant to have ensured the vehicle was not tampered with where, in fact, the vehicle was sourced out by the respondent, did not make commercial sense and was unreasonable. In any event, the fact that the ownership of the vehicle was transferred from the original owner to the appellant showed there was
- E nothing for the appellant to be suspicious about and, so to speak, it was a bona fide purchaser without notice of any tampering (see paras 14, 17-18 & 21).

[Bahasa Malaysia summary]

- F Responden mendekati perayu untuk membiayai pembelaan terhadap kereta terpakai dan pihak-pihak memasuki perjanjian sewa beli ('PSB'). Tidak lama kemudian, responden diberitahu oleh PUSPAKOM, apabila dia menghantar keretanya ke sana untuk pemeriksaan dengan niat memindahkan milik
- G kenderaan, bahawa nombor casis kereta tersebut telah diusik. Dia diberitahu oleh Jabatan Pengangkutan Jalan dan PUSPAKOM bahawa kereta di bukanlah yang boleh digunakan di atas jalan raya dan tidak patut dibawa di atas jalan raya. Responden memberitahu perayu mengenainya dan meminta perayu mengambil balik kereta tersebut dan memulangkan kesemua bayaran yang telah dibuatnya. Perayu enggan berbuat demikian dan meminta responden
- H untuk menyelesaikan tanggungjawabnya di bawah PSB tersebut. Selepas menyelesaikan kesemua bayaran yang perlu dibayar di bawah PSB tersebut, responden memohon perisytiharan daripada Mahkamah Tinggi bahawa PSB tersebut adalah tidak sah atas alasan terdapat kegagalan balasan sepenuhnya kerana dia tidak dapat memindahkan kereta tersebut kepadanya atas alasan
- I usikan yang didakwa ke atas nombor casis. Mahkamah Tinggi memutuskan PSB adalah batal ab initio dan memutuskan bahawa perayu, sebagai pemilik kereta, adalah bertanggungjawab untuk memastikan nombor casis kenderaan tidak diusik dan ia patut menghantar kereta tersebut ke PUSPAKOM untuk tujuan tersebut sebelum memasuki PSB. Perayu merayu terhadap keputusan

Mahkamah Rayuan. Responden merayu balas berkaitan kuantum yang diawardkan kepadanya oleh Mahkamah Tinggi. **A**

Diputuskan:

- (1) Responden gagal untuk membuktikan bahawa nombor casis kenderaan telah diusik dan bahawa perayu bertanggungjawab untuk usikan tersebut. Maka, perayu tidak dapat diputuskan bertanggungjawab untuk apa-apa kerugian yang dialami oleh responden. Terdapat merit dalam hujahan perayu bahawa responden patut mengemukakan laporan ahli kimia untuk membuktikan dakwaan usikan tetapi laporan sedemikian dikemukakan. Oleh itu, tidak terdapat asas undang-undang untuk Mahkamah Tinggi mengekalkan tuntutan responden (lihat perenggan 22 & 24). **B**
- (2) Tidak terdapat kewajipan ke atas perayu untuk mengesahkan nombor casis kenderaan tersebut sebelum penyewaan tersebut. Di dalam senario perjanjian sewa beli, responden yang membeli kereta secara terus daripada pemilik asal dan pembiaya seperti perayu hanya aktif apabila terdapat permintaan untuk kewangan. Dalam memberikan bantuan kewangan, perayu bergantung ke atas representasi responden bahawa tidak terdapat kecacatan berkaitan pemilikan kenderaan tersebut. Untuk menjangka perayu memastikan kenderaan tidak diusik, sebenarnya kenderaan tersebut diperolehi oleh responden, ia tidak logik dan tidak munasabah. Walau bagaimanapun, fakta bahawa pemilikan kenderaan dipindahkan daripada pemilik asal kepada perayu menunjukkan tidak ada apa-apa untuk perayu mencurigai dan, oleh itu, ia adalah pembeli bona fide tanpa notis mengenai apa-apa usikan (lihat perenggan 14, 17–18 & 21). **C**

Notes

For cases on allegation that the agreement was void, see 7(2) *Mallal's Digest* (4th Ed, 2013 Reissue) paras 4676–4679. **D**

Cases referred to

Ahmad Ismail v Malayan Motor Company & Anor [1973] 1 MLJ 117 (refd) **H**
Ketua Polis Ibu Pejabat Kontinjen Polis Seremban Negeri Sembilan & Anor v Manoharan a/l Dorasamy [2004] 3 MLJ 565; [2004] 1 CLJ 101, FC (consd)

Legislation referred to

Criminal Procedure Code s 413 **I**
 Police Act 1967 s 24(4)
 Road Transport Act 1987 s 10(3)

Appeal from: Suit No 22–70 of 2007 (High Court, Kota Bharu)

- A** *Wan Azman Wan Ahmad (Lua & Mansor) for the appellant.*
Wan Jawahir bt Harun (Wan Jawahir & Co) for the respondent.

David Wong JCA (delivering judgment of the court):

B INTRODUCTION

- C** [1] This is an appeal against the decision of the High Court in which the learned judge sustained the plaintiff/respondent's claim for a declaration that a hire purchase agreement between the respondent and the defendant/appellant dated 19 April 2003 is not valid and void.

[2] There is also a cross-appeal by the respondent in respect of the quantum awarded by the High Court.

- D** [3] We heard the appeal and cross-appeal and after due consideration to the respective submissions of counsel, we allowed the appeal and dismissed the cross-appeal. We now give our reasons.

E BACKGROUND FACTS

- F** [4] On or about early 2000, the respondent approached the appellant for finance to purchase a second hand Mercedes Benz bearing registration No WGT 7717 ('the vehicle'). The appellant accepted the application for finance and agreed that such finance is to be in the nature of a hire purchase agreement. The purchase price of the vehicle is in the sum of RM227,728.

- G** [5] The deposit of RM48,150 was paid by the respondent to the appellant for payment to the original owner with the balance to be paid by the appellant. The respondent then was to make a monthly installment of RM2,433 for 72 months under the hire purchase agreement commencing from 19 April 2000 to repay the facility granted by the appellant.

- H** [6] In 2004, the respondent went to Jabatan Pengangkutan Jalan ('JPJ') to enquire about the procedure of effecting the transfer of ownership of the vehicle. She was then informed that she had to get a report on the condition of the vehicle from PUSPAKOM before a transfer is allowed. The respondent obtained a report from PUSPAKOM dated 17 December 2004 which can be found in exh P1 (p 144 of the record of appeal). That report was only valid for 30 days from the date of the report. The report also states that there was tampering on the chassis number of the vehicle. The maker of the report is one Zakaria bin Yusof of PUSPAKOM Wangsa Maju, Kuala Lumpur.
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[7] The respondent was also informed by JPJ and PUSPAKOM that the vehicle was not roadworthy and should not be driven on the road. As a result of which, the respondent claimed she had stopped driving the vehicle and informed the appellant that she wanted to return the vehicle and demanded for the return of payments that she had furnished to the appellant.

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[8] The appellant refused the respondent's demand and instead requested the respondent to continue to pay the monthly payments in accordance with the hire purchase agreement which the respondent did until the monthly installments were fully paid off on 19 March 2006.

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[9] However, the respondent on 2007 took out this suit to seek a declaration that the hire purchase agreement is not valid and hence void.

THE HIGH COURT DECISION

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[10] The learned judge after reviewing the totality of the evidence held that the hire purchase agreement was void ab initio. His reasons were these.

[11] He found that it was the duty of the appellant as the owner of the vehicle to ensure that the chassis number of the vehicle had not been tampered with. Arising from that the learned judge said that the appellant should have sent the car to PUSPAKOM before the hire purchase agreement was entered to verify the genuineness of the chassis number.

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[12] The learned judge also found that it was unreasonable to impose that duty on the respondent, as at that material time the respondent did not have ownership of the vehicle.

OUR GROUNDS OF DECISION

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[13] To recap, the respondent's position is simply that there has been a total failure of consideration in that she was not able to obtain ownership of the vehicle after paying off the hire purchase agreement. And her inability to obtain ownership is due to the alleged tampering of the chassis number of the vehicle.

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Proof of tampering

[14] As this is her allegation, the law is trite and it simply demands that she who alleges bears the burden of proof. We are not in agreement with the learned judge as we find the respondent did not discharge the burden of proving tampering. Secondly, we are of the view that there is no duty on the appellant to verify the chassis number upon hiring. In this case, in proving the tampering the respondent produced the PUSPAKOM report. Learned counsel for the

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- A appellant attacked the usefulness of that report in that the report had expired as the time span of the report was only 30 days. It was also submitted that there was no chemist report tendered in court to prove that there was in fact tampering.
- B [15] We find merit in learned counsel's submission in respect of the need for a chemist report as proof of tampering for the simple reason that PW1's (Rahim bin Tuan Mat) had stated in his testimony that to prove tampering there must be a chemist report. PW1's evidence is that of the respondent and needless to say that evidence forms part of the respondent's case. What that simply means is that the respondent's case had been damaged by none other than her own witness. It also means that the respondent case contains no evidence of tampering of the chassis of the vehicle.
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- D [16] Further we say that P1 should not have been admitted as evidence for the simple reason that it is against the rule of hearsay. The maker of documents — P1 — one Zakaria bin Yusof was not called to testify. PW1 was authorised by PUSPAKOM to testify in court but such authorisation does not or could not overcome the substantive evidential hearsay rule. With that we now move to the appellant's duty to ensure that there was no tampering of the chassis number of the vehicle.
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The appellant's duty

- F [17] The learned judge had found that the appellant had the duty to ensure that the chassis number of the vehicle had not been tampered with before hiring. With respect we do not agree with the learned judge for the following reasons. It should be noted that in a hire purchase agreement, the financier is actually not the owner of the vehicle in the true sense of the word. What usually happens in reality as in this case is that the hirer usually sourced out the second hand vehicle to be purchased and the financier like the appellant only comes into the picture when there is a request for finance. Here there is no dispute that the deposit of RM48,150 was paid by the respondent. And in granting financial help, the appellant in fact had relied on the representation by the respondent that there is no defect whatsoever in respect of the ownership of the vehicle. To expect the appellant to ensure the vehicle is not tampered with where in fact the vehicle was sourced out by the respondent, does not make commercial sense and is unreasonable.
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- I [18] In any event the fact that the ownership of vehicle was transferred from the original owner of the vehicle to the appellant shows that there was nothing for the appellant to be suspicious of and so to speak, is a bona fide purchaser without notice of any tampering. In this context, of significance is s 10(3) of the Road Transport Act 1987 specifically states as follows:

- (3) No motor vehicle shall be registered unless — **A**
- (a) such vehicle bears a clear, distinct and untampered engine and chassis number; and
 - (b) the prescribed fee has been paid:

Provided that paragraph (a) shall not apply to any electric motor vehicle which has no engine number. **B**

The approval of the transfer by the registrar of JPJ to the appellant in our view speaks for itself.

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[19] Of relevance to this issue under consideration is the Federal Court case of *Ketua Polis Ibu Pejabat Kontinjen Polis Seremban Negeri Sembilan & Anor v Manoharan all Dorasamy* [2004] 3 MLJ 565; [2004] 1 CLJ 101. The facts there are these. The respondent there had in February 1994 purchased a car in Kota Kinabalu, Sabah which was later transported over to Peninsular Malaysia. **D**

The registration of the car was re-registered in Peninsular Malaysia by the Road Transport Department and prior to that re-registration the department had inspected the engine and chassis numbers of the car. After finding that there was no tampering the car was re-registered as NAJ 1912 with the endorsement that the respondent as its registered owner. **E**

However, the car was blacklisted by the second appellant there on the ground that the relevant documents might have been forged by a syndicate in Sabah. On 28 April 1994, the car was detained by the first appellant for the reason that it was stolen property. The car was later released back to the respondent on the 23 January 1995 on bond pursuant to s 413 of the Criminal Procedure Code (‘the CPC’). The release was triggered by a chemist report that although the car’s engine number had been tampered with, there was no way of knowing its original number or the car’s original owner. **F**

The respondent took out an originating summons to seek among others a declaration that he was the beneficial owner of the vehicle and also for damages. The learned High Court dismissed the originating summons premised on the ground that the detention was legal. On appeal, however, the Court of Appeal allowed the claim and ordered for damages to be assessed ruling that the detention, upon a proper reading of s 413 of the CPC and s 24(4) of the Police Act 1967 (‘the PA’), was beyond the period permissible under the law. The appellants appealed to the Federal Court and one of the questions posed was this: **G**

- (iii) whether ss. 8, 10, 11 and 12 of the Road Transport Act 1987 (‘RTA’) impose a duty on the second appellant as the Registrar of Motor Vehicles to inspect every vehicle submitted for registration or transfer of registration. **H**
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[20] Abdul Hamid Mohamad JCA (as he then was and was sitting as a member of the Federal Court) said as follows:

- A** So, reading ss 10 and 12 together, it is clear to me that the sections impose a duty on the registrar to inspect every vehicle before registration or transfer of registration. So, my answer to the third question is in the affirmative.
- But how the inspection is to be done is another matter. Is it sufficient that a normal physical examination be done or must the examination be done by a chemist?
- B** We see that in this case, the tampering was only discovered through the examination conducted by the chemist. The tampering was not discovered by all the earlier physical examinations by the second appellant and the respondent's own mechanic together with the respondent.
- C** I am of the view that it is unreasonable and not practical to require every inspection of the engine and chassis numbers of every vehicle to be done by the chemist, for the purpose of registration. It involves sending every vehicle to the Chemistry Department for such examination. That clearly would delay the process of registration of motor vehicles, considering the number of vehicles being registered every day. Indeed, the public would be the first to complain about the delay. So, in
- D** my view it is unreasonable to require an examination of every vehicle to be conducted by the chemist to ascertain the engine and chassis number before registration. Normal physical examination by officers of the second appellant would suffice. After all, s 12(1) only empowers the second appellant to inspect the vehicle. The subsection clearly means inspection by the second appellant. The court should
- E** not read more into the provision of the law.
- So, on the third question, I would answer it in the affirmative, even though I would not go so far as to require the second appellant to have the vehicle sent to and be examined by the chemist.
- F** Regarding the order made by the Court of Appeal, even though the original engine and chassis numbers and therefore the original owner could not be ascertained, but since it was never proved that the vehicle was a stolen vehicle (even though it was suspected to be so), since there is no dispute that the respondent is a bona fide purchaser, since the vehicle had been registered in the respondent's name and since the vehicle was seized from and later returned to the respondent, the orders made by
- G** the Court of Appeal are fair and appropriate.

- [21]** Even though the Federal Court case relates to the duty of the registrar of JPJ, we see no reason as to why we should not adopt the reasoning of the rationale therein. Hence we disagree with the view expressed by the learned judge. Since tampering of the chassis number can only be obtained by chemist report we are of the view that the appellant had no the duty to ensure that there has not been any tampering of the chassis of the vehicle by commissioning a chemist report. To impose such a duty in our view is not commercially viable in the context of a hire purchase agreement. The rationale for our view is that in
- H** a hire purchase agreement scenario, the respondent is the one who purchased the car directly from the original owner. The appellant in our view would rely on the representation of the respondent to finance the purchase.
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[22] We would refer to *Ahmad Ismail v Malayan Motor Company & Anor*

[1973] 1 MLJ 117. The Federal Court in that case dismissed the claim of the hirer of a second hand vehicle against the finance company when the performance of the contract was rendered impossible to perform due to intervention by a third party which was the police who had seized the vehicle on suspicion of it being stolen. The hirer's claim was premised on the implied condition that the finance company would pass good title of the vehicle to the hirer. The Federal Court held that when the deprivation of the aforesaid implied condition is not occasioned by the finance company/owner, it is therefore not liable. Similarly here, there is no evidence that the appellant was a party or even in any way aware of the tampering and thus could not be held liable for any loss suffered by the respondent.

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The respondent's remedy

[23] In our view, the respondent had not sought for an appropriate remedy in ensuring that the ownership of the vehicle can be transferred to her. It is undisputed that she had fully paid the amount due under the hire purchase agreement and the vehicle continues to be in her possession. The respondent could very well do what was done by the respondent in the Federal Court case of *Ketua Polis Pejabat Kontinjen Polis Seremban Negeri Sembilan & Anor v Manoharan all Dorasamy*. In that case, the respondent sought a declaration that he is the beneficial owner of the relevant vehicle and had cited the registrar of JPJ as one of the defendants. In that case the vehicle was suspected to be stolen property but in view of the fact that the original number of the engine and original owner could not be ascertained, the Federal Court affirmed the Court of Appeal decision declaring that the beneficial owner of the relevant vehicle was the respondent there. Whether or not the respondent herein would succeed in a similar application is a matter of conjecture. But be that as it may, until such time that the respondent can establish positively that she is not the beneficial owner, her suit so to speak is premature.

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CONCLUSION

[24] To summarise, it is our view that the respondent had failed to prove that there is tampering of the chassis number of the vehicle and even if tampering is proved, she had failed to prove that the appellant was responsible for the tampering. Accordingly we see no legal basis for the learned judge to sustain the claims of the respondent. Hence we allow the appeal with costs in the sum of RM15,000 to the appellant. The decision of the High Court is also set aside. We also order the respondent repay whatever amount received by her to the appellant.

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[25] Finally in view of our decision on the appellant's appeal, we are constrained to dismiss the cross-appeal of the respondent with no order as to costs.

A *Order accordingly.*

Reported by Ashok Kumar

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